

Tribe-State Partnerships: Bridging Differences to Improve Safety and Build Infrastructure in Indian Country

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Current Transportation
Issues In Indian Country



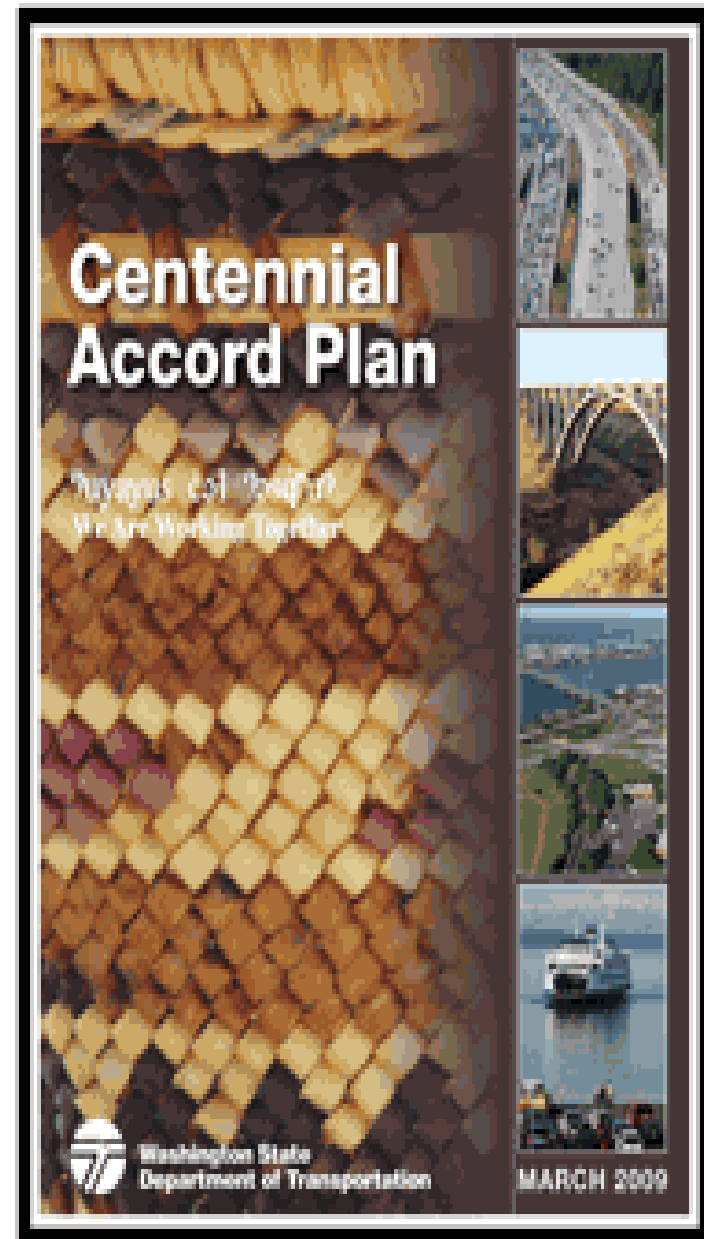
Presented by
Matt Jaffe, Partner
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
mjaffe@sonosky.com

Today, States and their Departments of Transportation (DOTs) are working to improve relations and promote cooperation and partnerships with Indian tribes.



WSDOT and Tribal Officials at a TTPO conference (2008); photo by Megan Nicodemus @ <http://www.wsdot.wa.gov/>.

Closer consultation and cooperation between State governments and Indian tribes in the transportation arena pay large dividends to both governments. By identifying common transportation goals and coordinating long-range transportation planning, State and Tribal governments are doing together what they cannot do as well apart.



Despite impediments to the direct transfer of various types of State-administered federal funds to Indian tribes (e.g., Federal-Aid, NHTSA, CTEP, and HSIP), some State DOTs are overcoming these barriers and writing a new chapter in State-Tribe relations.

“Governors value their important relationships with tribal governments. Governors recognize and respect the sovereignty of Indian tribal governments and support economic advancement and independence for tribes. State and tribal governments must continue to work together on many significant issues.”

- Policy Statement of the National Governors Association (2009).

“Native American tribal governments are sovereign self-governing entities. Much like state governments, tribal governments are responsible for the health, safety and welfare of their citizens and their communities. . . . **Tribal governments are on equal footing with state government** and have a government-to-government relationship with federal government. The sovereignty of each entity necessitates a government-to-government relationship at the state and tribal levels as well.”

- Statement of National Conference
of State Legislatures

Tribal-State relations were long marked by discord, distrust, disrespect and intergovernmental disputes. Tribal and State governments now realize they can achieve significant financial, social and governmental planning benefits by working together in a spirit of mutual respect and government-to-government cooperation. Many State governments have adopted some form of this successful federal policy and recognize Tribal rights of self-governance and self-determination.

- Washington State-Tribal Government-to-Government Guidelines (2000).

In Washington State, California, Arizona, Montana, North Dakota, Florida, Oklahoma and many other States with a significant Native American population, State DOTs are reaching out to Indian tribes in an inclusive manner (establishing Tribal liaisons, holding summits, and undertaking peer exchanges) to build tribal capacity in the transportation arena.

Today, Indian tribes are more qualified than ever to partner with State Departments of Transportation (DOTs) on transportation construction and highway safety improvements projects to reduce serious injuries and death caused by motor vehicle crashes on Indian Reservation Roads (IRR).

Statutory and Regulatory Changes:

- TEA-21.- In 1998, TEA-21 mandated that the Department of the Interior, with the assistance of the Department of Transportation, revise the Indian Reservation Roads (IRR) Program regulations (25 C.F.R. Part 170), and draft a new formula for the IRR Program;
- 25 CFR Part 170.- In 2004, the Bureau of Indian Affairs (BIA) issued the final rule for the IRR Program. That rule transformed the regional roads program into a “**Tribal shares**” entitlement program and introduced the “Tribal Transportation Allocation Methodology” (“TTAM”) funding formula to allocate IRR Program shares among the Nation’s tribes.

- TTAM's Relative Need Distribution Factor (RNDF) formula:
50% Cost-to-Construct + 30% Vehicle Miles Traveled + 20% N.A. POP.
- Expansion of IRR Inventory. - The Part 170 regulation expanded the IRR Program inventory to include State, county, township, city and borough transportation facilities that are located on or which provide access to an Indian reservation, Indian trust or restricted fee land, or Indian or Alaska Native Village or community in which Native Americans reside). *See*, 25 C.F.R. §170.226.
- IRRHPP Program. - The Part 170 regulation created an IRR High Priority Project (**IRRHPP**) Program (sets aside tens of millions of IRR Program funds annually for award to mostly smaller tribes to finance their highest priority project);

- PS&E Approval.- The Part 170 regulation authorized Indian tribes to approve Plans, Specification and Estimate (PS&E) packages for an eligible IRR Program construction project under certain circumstances. See, 25 C.F.R. § 170.462.
- Building Tribal Transportation Capacity.- The Part 170 regulations allowed Indian tribes to establish and fund transportation departments with IRR Program tribal shares;
- Enactment of SAFETEA-LU, P.L. 109-59 (Aug. 2005).-
 - growth of funding for the IRR and related programs:
 - from \$275 million/annually to \$450 million/annually
 - created IRR Bridge Program (\$14 million/annually)
 - created Tribal transit grant program (\$15 million/annually)

- Maintenance Funding.- authorizes tribes to use up to 25% of IRR Program transportation funds for road maintenance (23 U.S.C. § 204(c));
- PS&E.- re-affirmed the ability of tribes to approve PS&E packages using State-licensed civil engineers (23 U.S.C. §204(d)(2)(F)(ii));
- TIPs and STIPs.- requires FHWA-approved Federal lands highway program TIPs to be included in State and MPO plans (23 U.S.C. §204(a)(4));
- Maintenance Agreements.- allows States and tribes to enter into maintenance agreements without the approval of the Secretary of the Interior (23 U.S.C. §204(h));
- Contract Authority.- allows FHWA and Interior to enter into contracts or agreements with a State, political subdivisions, or an Indian tribe regarding transportation planning, engineering, and construction of highways, roads, and transit facilities on Indian reservations (23 U.S.C. §204(b)(1));
- Consultation.- mandates consultation of tribal governments by State DOTs during the preparation of state-wide transportation planning;

➤ FHWA-Tribe IRR Program Agreements.- directs the Secretary of Transportation (FHWA) to enter into agreements directly with Indian tribes to carry out the IRR Program serving their reservation;

➤ Tribes as Public Authorities.- SAFETEA-LU recognizes tribes as “public authorities” which can finance, build, operate and maintain public roads, bridges, transit systems and other toll or toll-free facilities. 23 U.S.C. 101(23); 25 C.F.R. 170.5.

SAFETEA-LU is fostering closer Tribe-State cooperation by requiring States and State DOTs to develop State TIPs, mitigation activities, and environmental documents in consultation with Indian tribal governments.

According to the BIA, in 2005, 50% of IRR Program appropriations were contracted by Indian tribes under a P.L. 93-638 contract. By 2010, 90% of IRR Program appropriations were contracted by Indian tribes under P.L. 93-638 or through direct agreements with FHWA as authorized under SAFETEA-LU. Tribes are expanding job opportunities for their members, establishing transportation departments and exercising rights of self-determination and self-governance.

PART 1

Understanding the Tribe-State Relationship



Understanding the unique relationship between Indian tribes and the States begins with understanding the two governments and the very different roads they traveled. Cooperation has not always defined Tribe-State relations, nor is it practiced equally today in every State.

The Federal Government's authority over Indian tribes, and its broad authority over national transportation policy, is derived from Article I, Sec. 8 of the U.S. Constitution:



“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

“To borrow money on the credit of the United States;

“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

“To establish post offices and post roads
. . . .”

“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.”

- *United States v. Wheeler*, 435 U.S. 313, 323 (1978), quoting *United States v. Mazurie*, 419 U.S. 544 (1975).

“[Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations . . . as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.”

- *United States v. Kagama*,
118 U.S. 375, 381-82 (1886)

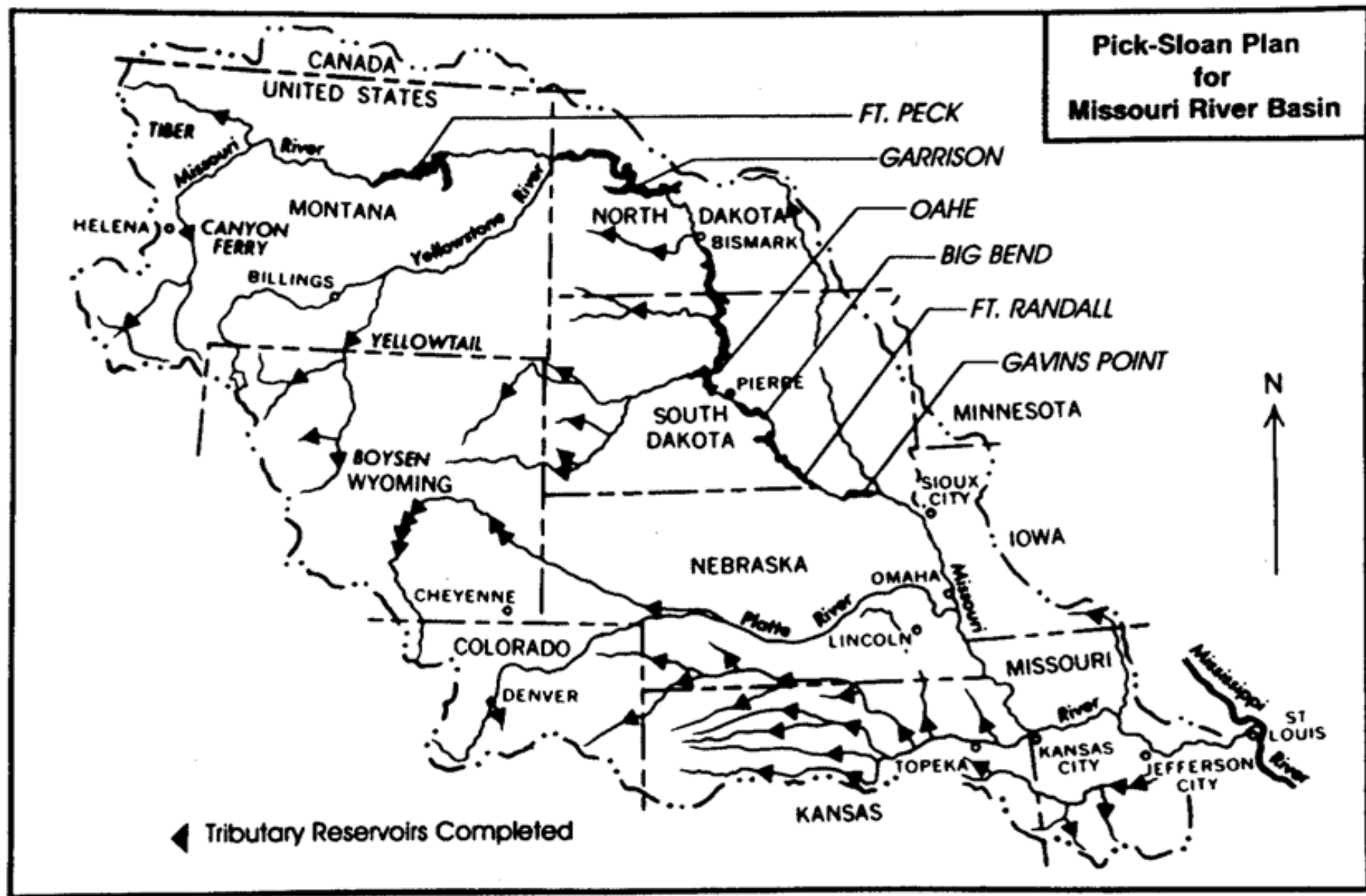
“Indian tribes ceded millions of acres that make the United States what it is today; in return, tribes received the guarantee that the federal government would protect the tribes’ right to govern their own people and their reservations as homelands for tribal cultures, religions, languages, and ways of life.”

- National Congress of American Indians (NCAI)
brief on Tribal Governance

Taking of Indian land by the United States did not occur only in the 18th and 19th centuries.

Actions by the U.S. Army Corps of Engineers, such as the taking of reservation lands to create the Pick-Sloan Missouri Basin Program and other dam projects, occurred within the memory of Native Americans living today.

Their memories of the flooding of tribal farmlands, the loss of tribal communities, sacred sites and transportation infrastructure, inform and influence tribal decision making today.



Lack of meaningful consultation by Federal and State agencies have often created transportation barriers that hinder the Tribes' ability to advance economically.

PART 2

THE MODERN ERA OF TRIBE-STATE RELATIONS

Today, we are in the modern era of Indian Self-Determination and Self-Governance where respect among Tribes, States, local governments and the Federal Government should be the norm, not the exception.

With enactment of the Indian Self-Determination and Education Assistance Act in 1975, P.L. 93-638, Indian tribes began assuming greater responsibility to manage programs and program funding for the benefit of their members.

The Obama Administration has made a concerted effort to reach out to the Nation's Indian tribes, and in November 2009 reaffirmed Executive Order 13175 concerning the unique government-to-government relationship between the United States and Indian tribes.

“History has shown the failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”

The United States, through its executive agencies, can and is also playing a role to foster greater cooperation and consultation between Indian tribes and States. Transportation laws have begun to realize the need to integrate Indian tribes into transportation policy making.



Although SAFETEA-LU contains many beneficial provisions for Indian tribes, the lack of statutory authority to allow Indian tribes to apply directly to federal transportation agencies for funds in lieu of making application to the States hinders the ability of tribes to access these funds and put them to use on their reservations and Native communities.

State contract forms and funding agreements are ill suited to transfer funds to Tribes because they often:

- require a waiver of tribal sovereign immunity;
- impose State procurement and project management standards that do not apply to tribes;
- require tribes to indemnify the States and require “hold harmless” provisions; and
- subject tribes to State courts.

Overcoming existing barriers to closer Tribe-State cooperation in the transportation and transit arenas – pooling resources and promoting joint planning, design and construction and highway safety improvements -- should be the priority of every Indian tribe and State DOT.

PART 3

WHY STATE-TRIBE COOPERATION IS SO IMPORTANT IN THE TRANSPORTATION ARENA

The magnitude of the problems both governments face and the different order of magnitude State and Tribal government have at their disposal to address them.



Road conditions on Standing Rock Sioux Tribe before the Tribe's Bullhead East/Community Streets Project, photo courtesy of Standing Rock Sioux Tribe. (2001)

- Motor vehicle injuries are the leading cause of death for Native Americans ages 1-34, and the third leading cause overall for Native Americans.

- NHTSA, DOT HS 809 921, Final Report, Oct. 2005, p.1.

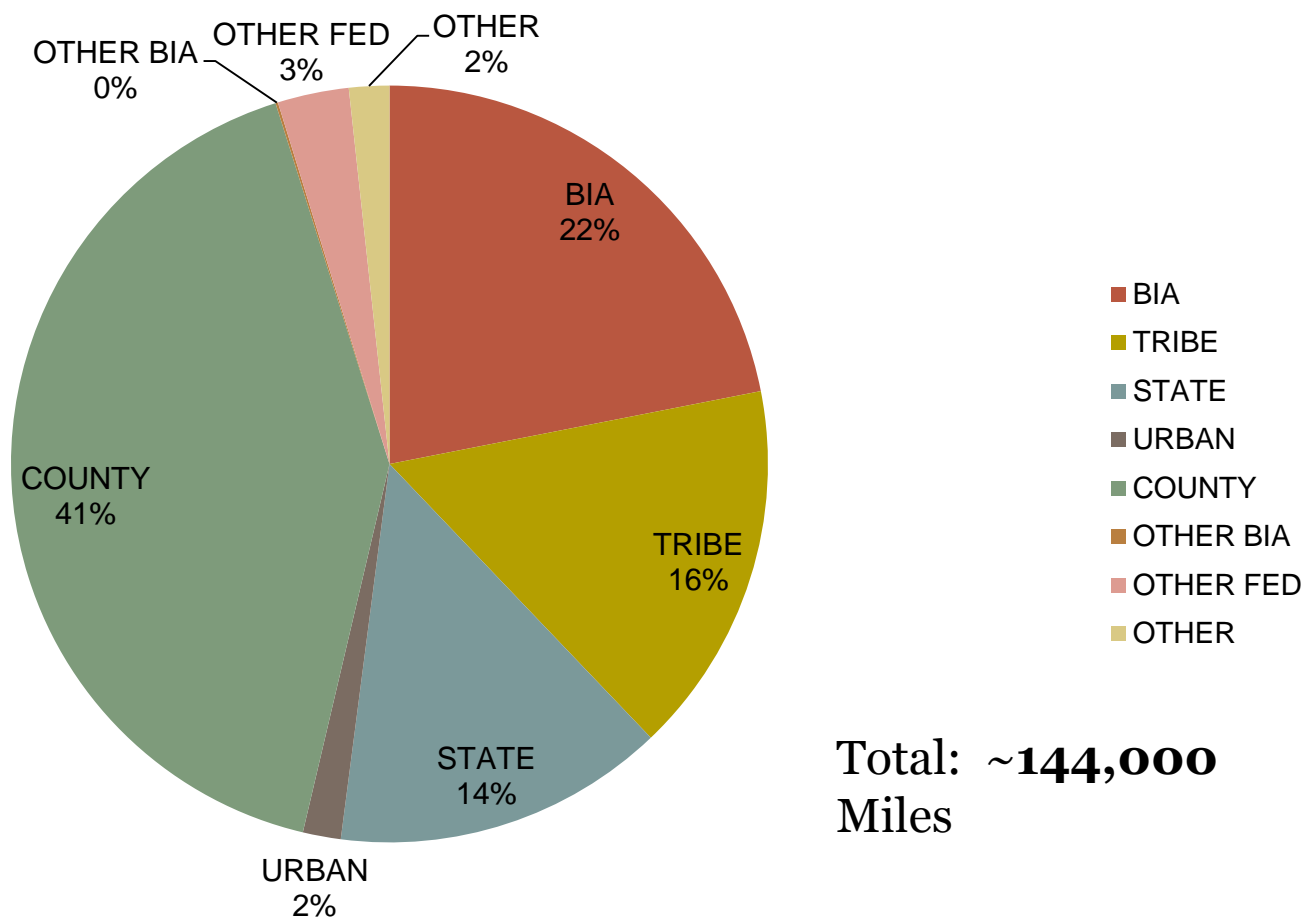
- In a 1989-1998 study, the Aberdeen, Billings, and Navajo Areas had motor vehicle-related death rates at least three times greater than the national rates.

- CDC, Injury Center, Atlas of Injury Mortality Among American Indian and Alaska Native Children and Youth, 1989-1998, Exec. Summary.



Damaged wood pilings under Four Mile Creek Bridge (BIA A045), Standing Rock Sioux Reservation (2009), photos courtesy of Standing Rock Sioux Tribe.

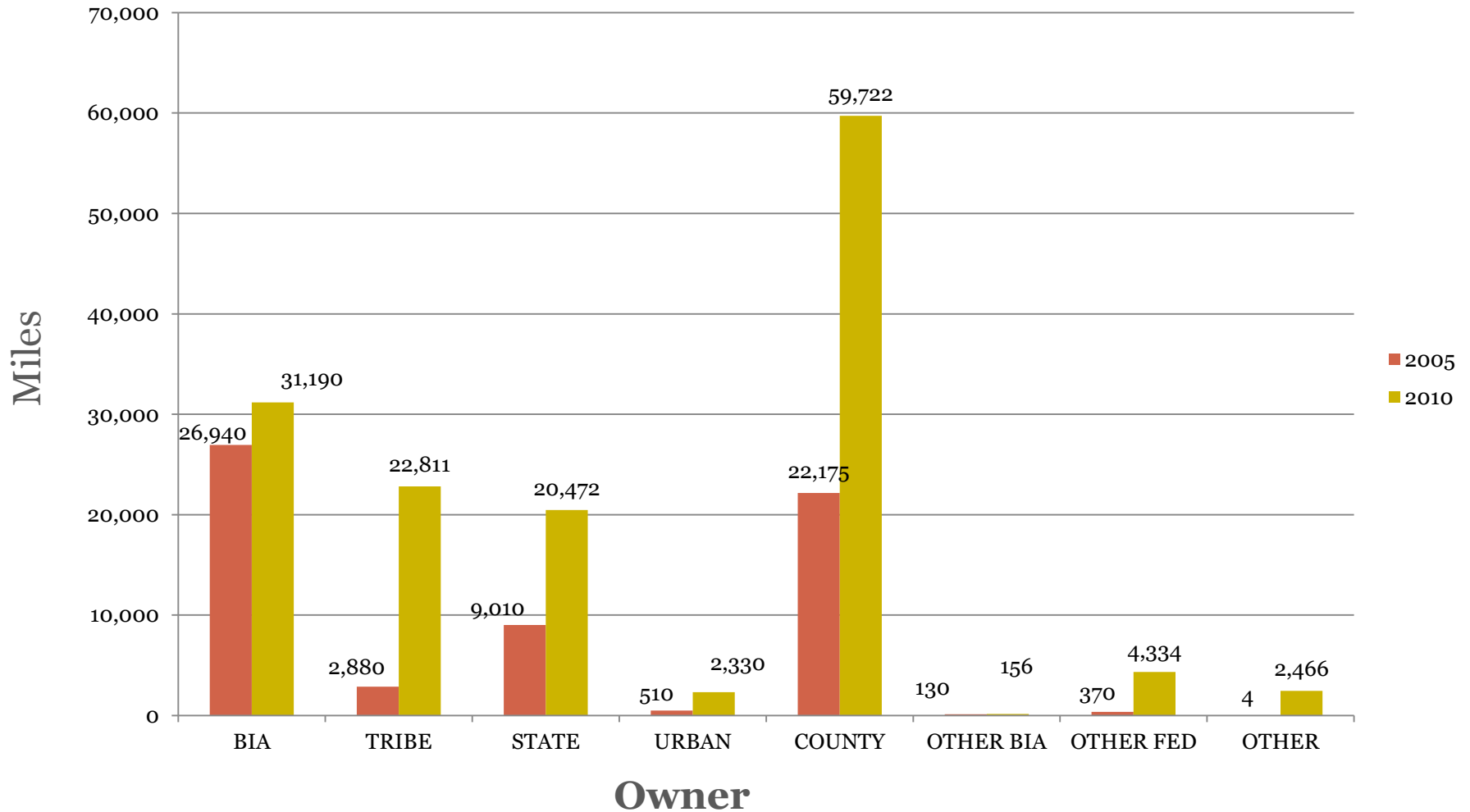
IRR by Ownership - FY2010



	BIA	Tribe	State	Urban	County	Other BIA	Other FED	Other
Owner	31,195	22,810	20,470	2,330	59,722	156	4,464	2,466

IRR Inventory FY2005 to FY2010

Miles by Ownership



FY2010 Final Control Panel			
Auhorization Amount	450,000,000.00		
Rescission	0%		
FHWA Takedowns per Approps Bill	0.000000%		
Ob Limit	6.50%		
Lake Tahoe (23 USC 5303(f)(3))	0.50%		
RABA	\$0		
PM&O/PRAE	\$27,000,000		
Tribal Transportation Planning	2.00%		
Amount over \$275M	\$175,000,000		
	<u>275k</u>	<u>>275k</u>	<u>Total</u>
Funding Amounts	\$275,000,000	\$175,000,000	\$450,000,000
Less rescission	\$0	\$0	\$0
Subtotal	\$275,000,000	\$175,000,000	\$450,000,000
Less FHWA takedown per Approps Bill	\$0	\$0	\$0
Subtotal	\$275,000,000	\$175,000,000	\$450,000,000
Less Lake Tahoe funding	(\$1,375,000)	(\$875,000)	(\$2,250,000)
	\$273,625,000	\$174,125,000	\$447,750,000
plus RABA	\$0	\$0	\$0
	\$273,625,000	\$174,125,000	\$447,750,000
Less obligation limitation	(\$17,785,625)	(\$11,318,125)	(\$29,103,750)
A Subtotal	\$255,839,375	\$162,806,875	\$418,646,250
Bridge Inspection	(\$427,778)	(\$272,222)	(\$700,000)
BIA PM&O*	(\$16,500,000)	(\$10,500,000)	(\$27,000,000)
(FLH) Inventory, Travel, Nat'l S&O, & Safety	(\$479,417)	(\$305,083)	(\$784,500)
Subtotal	\$238,432,180	\$151,729,570	\$390,161,750
Less 2% Planning (2% of A)	(\$5,116,788)	(\$3,256,138)	(\$8,372,925)
Subtotal	\$233,315,393	\$148,473,432	\$381,788,825
Available for RNDF	\$221,649,623	\$111,355,074	\$333,004,697
Available for IRRHPP	\$11,665,770	\$18,559,179	\$30,224,949
Available for PAF	\$0	\$18,559,179	\$18,559,179

To put the IRR Program in context, Federal appropriations for the **Relative Need Distribution Factor** (RNDF) formula – which funds construction projects for all 565 Indian tribes – totaled \$328 million in FY 2011. Tribal Transit Program funding totaled \$15 million.

By comparison, in FY 2011, Congress appropriated \$41.732 billion for Highway Infrastructure projects to the 50 States and the District of Columbia and \$10.2 billion for Public Transportation projects. The annual IRR RNDF allocation is 7/10 of 1% of the highway infrastructure figure 14/100 of 1% of the public transportation amount.

Washington State's FY 2011 allocation for Highway Infrastructure projects was just under twice the entire allocation for the IRR Program's RNDF allocation for all 565 Federally recognized Indian tribes for the same year. The State's Public Transportation project funding is 23 times the FY 2011 Tribal Transit Grant Program allocation of \$15 million for all of Indian country.

Washington State	FY 2011 Hwy Infr.	FY 2011 Public Transp.
	\$635.4 mil.	\$346 mil.
IRR Program RNDF	\$328.3 mil.	\$ 15 mil.

Without adequate resources to build administrative capacity, Indian tribes cannot be equal partners with States or local governments in areas of long-range transportation planning, design, construction, maintenance and creating and updating appropriate management systems to properly track, maintain and upgrade transportation inventories.

Federal appropriations for transportation and transit infrastructure in Indian country alone are inadequate to address the great unmet needs that exist. Unless State and local governments work cooperatively with Tribal governments to address transportation deficiencies, Indian country will continue to fall behind in areas of public safety, health care, education, housing and economic development.

Roads and bridges in Indian country have deteriorated at a faster rate than most because of the chronic failure by the Interior Department to request and Congress to adequately fund tribal road maintenance needs.

Lack of funding has hindered the ability of Indian tribes and Alaska Native Villages to build transportation departments, to engage in sustained long-range transportation planning, to interface with State DOTs, Metropolitan and Rural Planning Organizations (MPOs and RPOs), and to construct and maintain transportation facilities and essential infrastructure for their communities' current and future needs.

As a nation, we have reaped the benefits of previous generations' foresight and investment, generations that built a transportation system that became the envy of the world. . . . Over the last few decades we have grown complacent.”



- National Surface Transportation Infrastructure Financing Commission Final Report (2009), *Paying Our Way: A New Framework for Transportation Finance*, Executive Summary, p. 1.

The *2009 Report Card for America's Infrastructure* by the American Society of Civil Engineers graded the Nation's infrastructure as follows:

Roads	D-
Bridges	C
Transit	D

- Statement of Kathy J. Cadwell, P.E., President, ASCE, before House Transportation and Infrastructure Committee, March 30, 2011



BIA A069 Oak Creek Bridge, Standing Rock Sioux Reservation (2008), photo courtesy of Standing Rock Sioux Tribe.

“The lack of physical infrastructure has been repeatedly identified as one of the primary barriers to economic development in Indian country. Without water, sewers, roads and other basic infrastructure, economic development cannot occur. . . .”

- Congressman Nick J. Rahall II (D-WV), Ranking Member, House Committee on Transportation & Infrastructure (Feb. 2011).



Photo courtesy of Prairie Band of Potawatomi Indians (2007).

According to FHWA, local agencies own and operate $\frac{3}{4}$ of the Nation's public roadways. Over 60% of fatalities occur on rural roads (79% of which are owned by local agencies) even though they carry less than 40% of the Vehicle Miles Traveled (VMT). FHWA is committed to improve safety on local roadways.

The statistics reveal that Indian Reservation Roads are especially hazardous. But unless Federal funds get to Tribal governments, highway safety improvements on Indian reservations and Native communities will continue to lag behind the rest of the country.



Lack of Safe Routes to Schools and transit system for Nisqually tribal youth (2007), photo courtesy of the Nisqually Tribe.

Real highway spending per mile traveled has fallen by nearly 50 percent since the Federal Highway Trust Fund was established in the late 1950s.

Total highway and transit spending as a share of gross domestic product (GDP) has fallen by about 25% in the same period to 1.5% of GDP today.

- National Surface Transportation Infrastructure Financing Commission, Executive Summary, p. 1(2009)

Since 1993, the purchasing power of the 18.4 cent fuels tax has declined by more than 33%.



BIA Route 10, Fort Berthold Reservation, photo courtesy of Three Affiliated Tribes (2007)

“We need to invest at least \$225 billion annually from all sources for the next 50 years to upgrade our existing system to a state of good repair and create a more advanced surface transportation system to sustain and ensure strong economic growth for our families.”

- National Surface Transportation Policy and Revenue Study
Commission, Final Report, p. 1 (2008) (authorized by SAFETEA-LU).

According to Transportation for America, Federal, State and local support for transportation totaled \$204.5 billion in 2006. The Commission's recommendation advocates for a 10% increase (\$20.5 billion) above the 2006 level.

But through cooperation, partnerships and teamwork with States and local governments, tribes are rebuilding transportation systems and creating a better future for their communities.



Red Cloud School boys' basketball team winning the Region 8A championship (2009), photo available at theonlinephotographer.typepad.com.



Before and after photos of Ariwite Road Project, Fort Hall Reservation, photos courtesy of the Shoshone Bannock Tribes.



Oglala Sioux Transit vehicle, Pine Ridge Reservation, photo courtesy of the Oglala Sioux Tribe (2007).



Paving on Standing Rock Sioux Tribe (2006), photo courtesy of Standing Rock Sioux Tribe.

"Nothing is going to put people to work like a major transportation bill for this country."

- House Transportation and Infrastructure Committee
Chairman John Mica (R-FL), April 2011.



Paving on Standing Rock Sioux Reservation as part of the Tribe's Bullhead East/Community Streets Advance Construction Project (2006), photo courtesy of Standing Rock Sioux Tribe.



Reconstruction of High Bank Creek Bridge, Standing Rock Sioux Reservation (Oct. 2008), photo courtesy of Standing Rock Sioux Tribe.

PART 4

EXAMPLES OF STATE-TRIBE PARTNERSHIPS

North Dakota DOT- Standing Rock Sioux Tribe

In January 2012, the Standing Rock Sioux Tribe and the ND DOT signed a Traffic Safety Contract under which NDDOT, in conjunction with South Dakota, agreed to transfer a total of \$50,000 in National Highway Transportation Safety Administration (NHTSA) funds directly to the Tribe to establish the Tribe's first Tribal Traffic Safety Coordinator position to work with the Tribe and DOT to increase highway safety awareness and improve reporting of crashes to reduce the number of serious injuries and deaths caused on the reservation by motor vehicle crashes.

The breakthrough in the negotiation occurred when the NDDOT agreed in the contract and contract addenda to characterize the Standing Rock Sioux Tribe as a "governmental entity" rather than a "contractor." This exempted the Tribe from unacceptable indemnification and hold harmless requirements. Under the contract, NDDOT will reimburse the Tribe directly for eligible program costs and coordinate highway safety initiatives with the Tribe'.

The Traffic Safety contract will forge a closer working relationship between the Tribe and NDDOT and help save lives on the reservation.

- Montana-Assiniboine and Sioux Tribes

The Assiniboine and Sioux Tribes had sought Community Transportation Enhancement Program (CTEP) funds for a number of years to construct a bicycle and pedestrian path in Fort Kipp/Frazer and make repairs to a Veterans Memorial Park on the Fort Peck Reservation. Concerns by both State and Tribal officials over the award instrument terms and conditions prevented the two governments from successfully transferring the CTEP funds.

In 2011, with the assistance of FHWA and the BIA, the Tribes executed an agreement with the BIA whereby MDOT CTEP funds designated for the Tribes could be transferred by the State DOT to the BIA for award to the Tribes. FHWA agreed to provide oversight to ensure the Tribes' completion of the two CTEP Projects.

Because 23 U.S.C. 202(d)(3) limits transfers to tribal governments of chapter 2 of title 23 funds and section 125(e) funds (emergency relief for federally owned (ERFO) program), the Tribes and the BIA entered into the agreement pursuant to 23 U.S.C. 204(b)(2)(B) (authorizes DOT and Federal land management agencies to contract with States and Indian tribes).

- North Dakota – Spirit Lake Tribe

In 2010, the North Dakota DOT entered into two Memorandum of Understanding (MOUs) with the Spirit Lake Nation and with the Tribe and the Bureau of Indian Affairs (BIA) by which Highway Safety Improvement Program (HSIP) funds could be transferred to the Tribe to carry out safety projects on the Tribe's reservation.

Under the NDDOT-Tribe agreement, NDDOT agreement to transfer HSIP funds to the BIA for transfer to the Tribe and to help the Tribe apply for National Highway Traffic Safety Administration (NHTSA) funds.

Both the Tribe and NDDOT acknowledged in the MOU that while the number of motor vehicle fatalities in the State had been cut in half from 1971 to 2007 (from 227 to 111), the incidence of serious injury and death to Native Americans are disproportionately high and account for 20% of the State's motor vehicle fatalities each year.

The tri-party MOU acknowledged that the Tribe was “uniquely qualified to determine transportation safety needs” within the Tribe's reservation. The Tribe will use the HSIP funds to develop a safety plan for roads within and serving the reservation, including educational safety projects and small scale safety construction projects (e.g., signing and rumble strips, etc.).

• SOUTH DAKOTA – TRIBES

In 2005, the South Dakota DOT determined that the motor vehicle fatality rate among Native Americans in the State was more than three times the rate of non-Native Americans, and lack of traffic accident reports made it difficult to address recurrent roadway hazards or identify appropriate education and enforcement requirements.

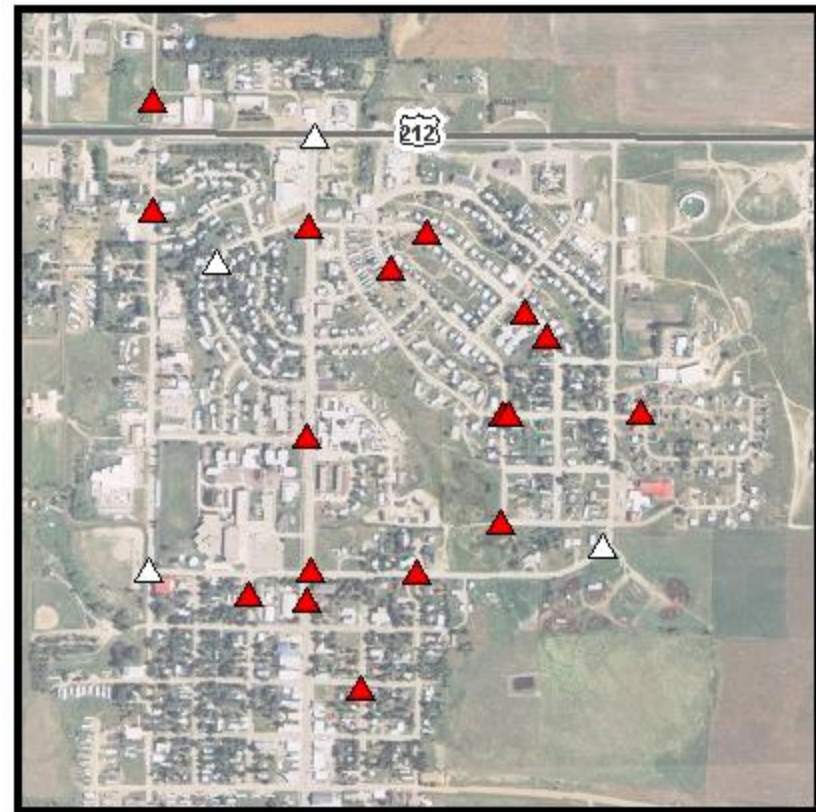
SDDOT set out to improve crash reporting gathering among the State's nine Indian reservations. Improved traffic crash reporting would enable both the State and Indian tribes to apply more successfully to BIA, FHWA and NHTSA and to make appropriate investments in safety improvements. After meetings with each Tribe, SDDOT and the Tribes identified three areas:

- 1) law enforcement officer training to complete and submit crash reports;
- 2) improving software programs to facilitate preparation of crash reports;
and
- 3) jurisdictional issues that create barriers to the widespread dissemination of crash data.

Traffic Crashes in Eagle Butte Cheyenne River Indian Reservation



2005 Previously Collected Crashes



2005 Collected by Study

Based on the work among the Tribes and SDDOT, five recommendations emerged from the work.

1. The SD Department of Public Safety (SDDPS) should expand training on crash reports for all tribal and BIA law enforcement officers, with the training tailored to tribal law enforcement needs.
2. The SDDOT should work directly with tribal councils to establish crash reporting as a priority for law enforcement on tribal lands and to establish criteria for maintaining the confidentiality of such information.
3. The SDDPS should encourage and facilitate grant applications from tribes to support tribal efforts to more establish more effective internal processes to record and track crash data.
4. The SDDPS should simplify reporting requirements by developing a crash report that more closely mirrors the SD crash report form.
5. SDDOT should actively facilitate the identification of rural hazards on tribal lands and fund improvements to motivate crash reporting on reservations.

The Road Ahead

Indian tribes, State DOTs and local governments have shared interests in building smart and efficient transportation infrastructure and transit systems for the 21st century. These governments are all transportation stakeholders. The more effectively they pool their talents and resources, especially in difficult economic times, the greater their chances to meet the transportation challenges facing them and their constituents.

Questions?

Matt Jaffe
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
1425 K St., N.W., Suite 600
Washington, D.C. 20005
(202)682-0240
mjaffe@sonosky.com